93-920

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO.

WENDELL L. FENNELL and CELINA FENNELL,
PETITIONERS

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY; NATIONSBANK OF TEXAS, INC. (NCNB) and, FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF FIRST REPUBLICBANK ABILENE, N. A., TIM COLLARD, INDIVIDUALLY, JOHN CLARK, INDIVIDUALLY, and JOHN COMBS, INDIVIDUALLY,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Wendell Fennell and,
Celina Fennell,
Petitioners
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QUESTIONS PRESENTED FOR REVIEW

This most honorable court is requested to resolve the substantial conflict between the Fifth Circuit's opinion in this case and the prior opinions of the Fifth Circuit, Eleventh Circuit, the Texas Courts and Texas Statutes. This conflict is presented under "Reasons for Granting Writ." Questions presented for review are:

Agreement with NCNB (bridge bank)

1. Does the *D'Oench, Duhme* doctrine empower the FDIC or the bridge bank (NCNB) with the defense to bar claims of breach of an agreement between a borrower and the bridge bank.

2. Does the *D'Oench, Duhme* doctrine supersede federal statutes with respect to freedom of the bridge bank to contract and to possess the same rights and obligations as a national bank as provided in 12 U.S.C. 1821(n)(4)? Further, does the *'D'Oench, Duhme* doctrine operate to

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supersede the Fourteenth Amendment rights to contract?

3. Does the *D'Oench, Duhme* doctrine bar claims of breach of *12 U.S.C. 1821(n)(3)(B)* with respect to obligations to credit worthy borrowers of the failed bank.

4. Does the *D'Oench, Duhme* doctrine bar claims of fraudulent acts committed by the FDIC/bridge bank (post failure) and provide for the exclusion of evidence at trial of such claims.

5. Is the Presumptive Correctness doctrine relevant today with respect to the FDIC in either its receiver or corporate capacities? If so, does this doctrine extend to NCNB? Instead of relying upon the trial record, the appellate court in its zeal to maintain its docket schedule appears to have relied upon the Presumptive Correctness doctrine to affirm the trial court's directed verdict and judgment *n.o.v.* Findings that the

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FDIC/NCNB must be correct because of its prestige and familiarity with the court is evident based on the court's findings that are contradictory to the actual evidence. The numerous errors in the Appellant Courts findings strongly suggest that an apparent lack of reviewing the record. Should the Presumptive Correctness doctrine excuse the court from a de novo review?

Agreement with FRB (failed bank)

6. Did the Appellate Court apply the *D'Oench, Duhme* doctrine too rigorously by finding that the Fennells' claims are barred when: (1) The agreement was prepared by the failed bank, (2) When all the essential terms of the agreement (meeting all the requirements for a binding agreement under Texas Law) was recorded in the minutes of the failed bank, (3) The recorded document of the agreement signed by ten members of the Senior Loan Committee (the party to be

bound), (4) The agreement was relied upon and accepted (executed) by the borrower evidenced by exhibits in the integral loan files (related notes), and (5) The parties bound (FRB and NCNB) received the benefits of the agreement.

7. Does the *D'Oench, Duhme* doctrine bar claims with respect to assets not acquired by the FDIC in its receiver capacity.

8. Does 12 U.S.C. 1823(e) and/or the *D'Oench, Duhme* doctrine bar claims of breach of agreement when the agreement is in writing (in the failed bank files) but not written on the face of a specific promissory note.

Directed Verdict and Judgment *n.o.v.*

9. After a trial court has granted a Directed Verdict, is not the proper course of action an appeal to a higher court of jurisdiction rather than demand special jury issues in spite of the directed verdict?

10. Does the *D'Oench, Duhme* doctrine supersede the **clearly erroneous** standard required for overturning a jury verdict that is based solely on facts? Is it abuse of discretion for a trial or an appellate court to override a jury verdict against the overwhelming weight of the evidence? The jury verdict was solely against the actions by the bridge bank, NCNB. The trial court granted a directed verdict which denied the jury questions concerning the actions of the failed bank. The special jury issues were supported by hard evidence from the bank's file, writings originated by the bridge bank, and unimpeached sworn testimony.

11. Is it abuse of discretion for a trial court to grant judgment *n.o.v.* without one word of finding of fact or conclusion of law and then the appellate court affirm the judgment without a review of the record? Is not a de novo

review required?

Contract Law

12. Can a bank avoid liability for breach of a loan commitment by claiming that a borrower did not give consideration for the **commitment** where recorded agreement provides for giving of promissory notes and valuable real property as collateral? Does not the opportunity to earn several thousand dollars in interest from a borrower's performance, pursuant to the loan commitment, act as consideration for the bank (i.e., FRB or NCNB)?

13. Would it be good federal common law that an agreement is not binding on the part of a bank because the agreement did not provide for a loan closing date when: (1) Closing could have been done at the discretion of the bank (and absolutely within control of the bank), and (2) Closing could have been can done within a few hours (simple matter of preparing paper work), and (3) The loans

had one year maturities (payback performed within one year, although renewed as needed).

14. Is it judicial for any court to add an essential element of an agreement that is contrary to the recorded evidence and the sworn testimony at trial (i.e. the court added that NCNB agreed only to honor those agreements passing the D'Oench, Duhme doctrine test).

15. When a court applies any doctrine too rigorously (i.e. *D'Oench* applied to promises made by the bridge bank) and the ruling becomes precedent, shouldn't there be a provision that the parties to be offended be given due notice in the interest of justice and due process. Such provision is found in Tex. Bus. and Com. Code § 26.02.

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FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY; NATIONSBANK OF TEXAS, INC. (NCNB) and, FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF FIRST REPUBLICBANK ABILENE, N. A., TIM COLLARD, INDIVIDUALLY, JOHN CLARK, INDIVIDUALLY, and JOHN COMBS, INDIVIDUALLY,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Wendell Fennell and Celina Fennell (the "Fennells"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for

the Fifth Circuit entered in this proceeding on August 19, 1993, and rehearing denied on September 15, 1993.

This case involves major conflicts with prior decision by the Supreme Court, the Fifth Circuit, Texas Law (common and statute), and other circuits. Further, it is contrary to the Fourteenth Amendment to the U. S. Constitution and fundamental fairness.

OPINIONS BELOW

It was determined by the Fifth Circuit Court of Appeals that their opinion in the case at bar should not be published. The opinion of the Court of Appeals is attached hereto as Appendix "A." On September 15, 1993, it denied the Fennells' petition for rehearing without comment (Appendix "B").

The United States District Court for the Northern District of Texas did not issue an opinion in this case. The order by the trial court granting judgment and

judgment *n.o.v.* entered on April 16, 1993 is attached hereto as Appendix "C."

JURISDICTIONAL STATEMENT

The jurisdiction of the Federal District Court was invoked pursuant to the Fifth Circuit Court of Appeals decision dated September 24, 1991.

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 19, 1993. The Fennells filed their petition for rehearing on August 27, 1993. The Appellate Court entered its order denying petition for rehearing on September 15, 1993. The jurisdiction of this most honorable Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES INVOLVED

This case involves the interpretation and application of 12 U.S.C. 1821(n)(3)(B), 12 U.S.C. 1821(n)(4), and 12 U.S.C. 1823(e), and Texas Statutes as

follows:

§ 1821(n)(3)(B)

"It is the intent of Congress that, in order to prevent unnecessary hardship or losses to the customers of any insured bank in default with respect to which a bridge bank is chartered, especially creditworthy farmers, small businesses, and households, the [**FDIC**] should -

(i) continue to honor commitments made by the bank in default to creditworthy customers, and

(ii) not interrupt or terminate adequately secured loans which are transferred under subparagraph (A) and are being repaid by the debtor in accordance with the terms of the loan instrument."

§ 1821(n)(4)

"POWERS OF BRIDGE BANKS.--Each bridge bank chartered under this subsection shall have all corporate powers of, and be subject to the same provisions of law as, a national bank, except that--

"(A) the Corporation may--

"(i) remove the interim directors and directors of a bridge bank;

"(ii) fix the compensation of members of the interim board of directors and the board of directors and senior management, as determined by the Corporation in its discretion, of a bridge bank; and

"(iii)waive any requirement established under section 5145,

5146, 5147, 5148, or 5149 of the Revised Statutes (relating to directors of national banks) or section 31 of the Banking Act of 1933 which would otherwise be applicable with respect to directors of a bridge bank by operation of paragraph (2)(B);

§ 1823(e)

"No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank."

Texas Statutes

1. Tex. Bus. & Com. Code Ann. § 26.02:
(Effective date September 1, 1989)

"**§ 26.02. Loan Agreement must be in Writing**

(a) In this section:

(1) "Financial institution" means a state or federally chartered bank, sav-

ings bank, savings and loan association, or credit union, a holding company, subsidiary, or affiliate of such an institution, or a lender approved by the United States secretary of Housing and Urban Development for participation in a mortgage insurance program under the National Housing Act (12 U.S.C. Section 1701 et seq).

(2) "Loan agreement" means one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, pursuant to which a financial institution loans or delays repayment of or agrees to loan or delay repayment of money, goods, or another thing of value or to otherwise extend credit or make a financial accommodation. The term does not include a promise, promissory note, agreement, undertaking, document, or commitment relating to:

(A) a credit card or charge card; or

(B) an open-end account, as that term is defined by Article 1.01, Title 79, Revised Statutes (Article 5069-1.01, Vernon's Texas Civil Statutes), intended or used primarily for personal, family, or household use.

(b) A loan agreement in which the amount involved in the loan agreement exceeds $50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative.

(c) The rights and obligations of the parties to an agreement subject to Subsection (b) of this section shall be determined solely from the written loan agreement, and any prior oral agreements between the parties are superseded by and

(d) An Agreement subject to Subsection (b) of this section may not be varied by any oral agreements or discussions that occur before or contemporaneously[1] with the execution of the agreement.

(e) In a loan agreement subject to Subsection (b) of this section, the financial institution shall give notice to the debtor or obligor of the provisions of Subsections (b) and (c) of this section. The notice must be in a separate document signed by the debtor or obligor or incorporated into one or more of the documents constituting the loan agreement. The notice must be in type that is boldface, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. The notice must state substantially the following:

"This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent[2] oral agreements of the parties.

"There are no unwritten oral agreements between the parties.

"Debtor or Obligor"	Financial Institution

1.So in enrolled bill; subsec. (e) makes reference to prior, contemporaneous or subsequent agreements.

2.So in enrolled bill; subsec. (d) makes reference to oral agreements before or contemporaneously with the execution of the agreement.

(f) If the notice required by Subsection (e) of this section is not given on or before execution of the loan agreement or is not conspicuous, this section does not apply to the loan agreement, but the validity and enforceability of the loan agreement and the rights and obligations of the parties are not impaired or affected.

(g) All financial institutions shall conspicuously post notices that inform borrowers of the provisions of this section. The notices shall be located in such a manner and in places in the institutions so as to fully inform borrowers of the provisions of this section. The Finance Commission of Texas shall prescribe the language of the notice."

STATEMENT/BACKGROUND OF THE CASE

This case has two distinct parts: (1) is about a breach of an agreement between the **Fennells and NCNB** (a bridge and successor bank to the failed FRB), and (2) do the writings in the failed bank's file (Appendices "D" through "H") meet the requirements (the essence) of the *D'Oench, Duhme* doctrine.

Most Significant Background Events

1. On April 9, 1987, bank officer, Tim Collard, meets with Wendell Fennell to discuss Fennell's purchase of bank's property located at 41 Hoylake, Abilene,

Texas (Appendix "D", also TR I, p. 228, lines 10-18, p. 229, lines 15-24; TR II, p. 5, lines 21-23, p. 6, lines 2-7).

2. On April 13, 1987, Wendell Fennell submits written offer for banks property contingent upon certain financing (Appendix "E"). This contingency was confirmed by bank's loan officer, Tim Collard (TR I, p. 77, lines 18-21) to be loans #3 and #4 described in bank's minutes.

3. On April 24, 1987, Tim Collard submits a detail analysis of the agreement to Senior Loan Committee for their approval (Appendix "F").

4. On April 24, 1987, Senior Loan Committee agrees (signed by ten voting members) to the proposal as presented, including the details of each loan approved (Appendix "G").

5. On May 18, 1987, the Fennells close on the purchase of the bank's property, signing the mortgage and deed

of trust in a closing attorney's office and the note for the down payment in Tim Collard's office. Collard advised Wendell Fennell that paper work was not ready on notes #3 and #4, but he could get them any time. Further, advising that loans had been approved by the committee, so he need not be concerned.

6. On or about June 1, 1987, Tim Collard advised Wendell Fennell that the bank would fund the note for $26,625.00 and the $15,000.00 line of credit as agreed (TR II, p. 24, lines 16-25, p. 25, lines 1-15). Later, Tim Collard advised Wendell Fennell that the paperwork would be delayed due to the merging of InterFirst and RepublicBank (TR II, p. 28, lines 5-25, p. 29, lines 1-11). This delay was again explained by Tim Collard to Wendell Fennell on or about November, 1987 (TR II, p. 11-25, p. 34, lines 1-10).

7. On February 8, 1988, Tim Collard

complied with Wendell Fennell's demand for a writing confirming the agreement (Appendix "H").

8. On July 29, 1988, when Wendell Fennell was at NCNB to sign a routine renewal, Tim Collard informed Wendell Fennell that since NCNB had taken over, that he would now fund the note, $26,625.00, and the line of credit. Explaining that the difficulties he was having with the management of FRB were over (TR II, p. 49, lines 3-13, p. 52, lines 13-15).

9. In November, 1988, NCNB sent notices to the Fennells (included in their October bank statement) representing that the agreements they had with FRB would be honored (Appendix "I", TR Ex 56, TR II, p. 58, 59, TR I, p. 198, lines 5-17).

10. On or about December 27, 1988, NCNB (Tim Collard) represented that the existing notes would be amortized as

originally agreed to with FRB (Appendix "J", TR II, p. 60, lines 16-25, p. 61, lines 1-16)

11. On May 12, 1989, after numerous occasions of stalling by NCNB, Wendell Fennell emphatically demanded that NCNB complete the agreement as they promised. Tim Collard responded that NCNB had no intention of funding the loans and that they just wanted the Fennells payments (TR II. p. 75, lines 13-17).

12. On May 15, 1989, Wendell Fennell sent a letter to NCNB (John Combs, Pres.) claiming breach of agreement and demanding remedies (Appendix "K").

13. On July 21, 1989, Wendell Fennell sent a letter to NCNB's attorney increasing their demand (Appendix "L").

14. Numerous complaints were filed with the Attorney General, the Comptroller of the Currency, and Texas Congressmen, prior to obtaining legal counsel on or about August 8, 1989. The Fennells

also ceased making payments on all notes to NCNB due to breach of the agreement and legal counsel's recommendation.

15. NCNB foreclosed on the Fennells properties and filed a deficiency suit, Cause No. 3,255-D in state court in December, 1989. The Fennells filed a counter-suit in February, 1990, in the 350th District Court of Taylor County, Texas.

16. FDIC filed a plea of intervention and a notice of removal of Cause No. 3,255-D to the Federal District Court on February 22, 1990 and February 23, 1990, respectively.

17. On December 21, 1990, The Federal District Court found that the FDIC improvidently removed case to Federal court, ordered (sua sponte) FDIC's dismissal and remanded Cause No. CA-1-90-022-C to 350th District Court in an for Taylor County, Texas (Cause No. 3255-D).

18. On May 3, 1991, the Fennells

filed their Second Amended Petition, in Cause No. CA-1-90-022-C which had been remanded to the 350th District Court of Taylor County, Texas (Cause No. 3255-D). The Fennells added their former attorney and the FDIC-C as Third Party Defendants in their Second Amended Counterclaim, based on a claim that their attorney had engaged in employment negotiations with the FDIC-C while acting as the Fennells' attorney and he non-suited two of NCNB's employees after he was terminated. Tortuous interference was claimed against the FDIC-C.

19. On May 28, 1991, the U. S. Court of Appeals for the Fifth Circuit ordered stay of litigation pending appeal of remand order. Following oral argument, the U. S. Court of Appeals for the Fifth Circuit, on September 24, 1991, reversed the District Court's dismissal of the FDIC and returned case to the Federal District Court (basis for federal

jurisdiction). It is ironic (with respect to the final opinion rendered in this case) **that during oral argument at the Fifth Circuit, Senior Judge, Renaldo Garza informed the NCNB attorney that he would loose this case, and told the Fennells that they should not be concerned about which court, they had a good case just go back and try it.**

20. Prior to trial the court denied the Fennells' amended petition with respect to FDIC-C and their former attorney; however, the trial court granted the substitution of FDIC-C as plaintiff without prejudice to the previous briefing. However, the Fennells were not allow to go forward with any claims against the FDIC-C.

21. Trial on the merits of this cause began March 16, 1992. **The Jury rendered its verdict (NCNB breached its agreement with the Fennells) in favor of the Fennells on March 19, 1992**. On April

16, 1992, the trial court granted Appellees' (FDIC, NCNB, and Officers) Motions for Judgment and Judgment Notwithstanding the Verdict.

22. The Fennells timely perfected their appeal to the Fifth Circuit. The Fifth Circuit disposed of this case by denying petition for rehearing on September 15, 1993.

REASONS FOR GRANTING THE WRIT

Concise Argument

The Jury found that NCNB had an agreement (supported by recorded evidence) with the Fennells and it was the agreement between NCNB and the Fennells that was breached (the Jury was not permitted to consider special issues related to the failed bank).

The agreement between NCNB and the Fennells was supported by recorded evidence. The Jury could only have based its decision on the numerous documents (recorded agreements) and the supporting

testimony at trial, not unrecorded side agreements. All of the matters were factually based and were within the sole province of the Jury as the Finder of Fact; therefore, the court(s) overturning of the jury's verdict was subject to the **clearly erroneous** standard.

The Fifth Circuit affirmed the District Court Judgment, concluding that the Fennells' defenses and claims are barred by the *D'Oench, Duhme* doctrine. However, *D'Oench, Duhme* simply does not extend to bridge banks such that the bridge banks or acquiring banks may enter into agreements with consumers and then avoid performance based on *D'Oench, Duhme* (it only protects the FDIC and bridge bank from secret agreements borrowers had with failed bank). *FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al., v. Thomas S. MACKIE*, 962 F.2d 1144 (5th Cir. 1992). The language in *Mackie* is illuminating with respect to recorded

agreements in the failed bank's files:

> "He can, however, assert defenses that are based on obligations contained in the written Loan Agreement, as long as he does not rely on any unrecorded agreements to support his allegations. FDIC v. Laguarta, 939 F.2d 1231, 1239 (5th Cir. 1991). Therefore, we remand Mackie's claims that Lamar breached the loan agreement, breached its duty of good faith, and violated the TDTPA to the district court."

The only difference in Mackie and the case at bar is the Jury has already determined that an agreement existed between NCNB and the Fennells and it was breached by NCNB. But the Jury was not allowed to decide the issue in the context of the failed bank (FRB). Based on the finding in Mackie, the jury must be permitted to decide Fennells' claims and defenses to the notes with respect to the failed bank (FRB) as well as NCNB. The findings and conclusions of the Appellate Court are so opposed to 5th Circuit precedents and other circuits, that the **U. S. Supreme Court must settle this**

contradiction and abuse of the clearly erroneous standard.

Expanded Argument

The applicable statute, 12 U.S.C. 1821(n)(4) provides that bridge banks shall have the freedom to contract and shall be subject to the same laws as any national bank (except matters related to directors and capitalization). The Fennells' freedom to contract with NCNB is an inalienable right provided by the Fourteenth Amendment to the U.S. Constitution as well as Texas Law. Does the *D'Oench, Duhme* doctrine invade and overthrow these rights and obligations? Obviously not, yet the ruling by the Appellate Court has denied the Fennells their right to the benefits of the bargain they had with NCNB by extending the *D'Oench, Duhme* doctrine to bar agreements with bridge banks.

The agreement that the Fennells had with NCNB was also part of an agreement

the Fennells had with the failed bank. The primary difference is the contingency. The Fennells do not claim that NCNB agreed to loan the Fennells certain amounts if and only if the Fennells purchase some of their property, this claim is only against FRB (breach of the Tying Act). However, NCNB agreed to honor the agreement with respect a line of credit (Loan #4) and a note (Loan #3) identical to the Loans #3 and #4 described in the failed bank minutes and other parts of the integral loan file. When one looks at these documents (that contain the understanding which includes the essential terms) to determine if it passes the *D'Oench, Duhme* screen, one readily sees that these documents do. However, with respect to NCNB's promises, it is not necessary that the documents pass the *D'Oench, Duhme* screen.

The Fifth Circuit denied the application of the draconian *D'Oench, Duhme*

doctrine in *FDIC v. Laguarta*, 939 F.2d 1231, 1238-39 (5th Cir. 1991) for reasons similar to the Fennells' facts. In *FDIC v. Laguarta* the Fifth Circuit held that an obligation to fund, found in a loan agreement[3] which was a separate document from the promissory note sued on was not barred by the *D'Oench, Duhme* doctrine.

In the instant case the Fennells have produce unimpeachable evidence that the agreement (promise) to fund was in the failed bank's integral loan file and that the bridge bank (NCNB) represented to the Fennells that NCNB would honor the remaining obligations contained therein (Appendices "D" through "J").

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3. Loan agreement is defined in Texas Law to mean "one or more promises, promissory notes, agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, pursuant to which a financial institution loans or delays repayment of or agrees to loan or delay repayment of money, goods, or other things of value or to otherwise extend credit or make a finance
Com. Code Ann. § 26.02 (Vernon 1989).

This case is easily distinguishable from the facts in *Beighley v. FDIC*, 868 F.2d 776, 783 (5th Cir. 1989). Not only were the alleged agreement(s) not in writing in *Beighley*, the bridge bank made no representation that it would perform. It is ironic (also unbelievable) that the findings and conclusions in this case seems to be adding that the agreement between the Fennells and NCNB (as opposed to the agreement the Fennells had with the failed bank) had to meet the constraints of § 1823(e). This argument was not made at trial and the Jury was not presented with any evidence by the Fennells nor NCNB, that NCNB would only honor those agreements that met the constraints of § 1823(e) (or *D'Oench, Duhme*). NCNB's promises were never made with any reference to any condition that was a matter of law. The NCNB writing reads: "All contracts and other agreements are also still in force." NCNB's

loan officer, Collard, made specific promises that the two loan (#3 and #4) would be made, but never mentioned one word about § 1823(e), or *D'Oench, Duhme*. No notice was given such as is required by Texas Law, Tex. Bus. & Com. Ann. § 26.02 (Vernon 1989), with respect to loan agreements. For the Appellate findings to be valid the wording should have been something to the effect that: "All contracts and other agreements which meet the constraints of the *D'Oench, Duhme* doctrine or § 1823(e) are also still in force." The findings in this case appears to have produced facts that were not in evidence before, during or after trial and the conclusions are in conflict with prior rulings by the Fifth Circuit.

In *Resolution Trust Corporation v. Oaks Apts. Joint Venture*, 966 F.2d 995 (5th Cir. 1992) and *FDIC v. Laguarta, supra*, the Fifth Circuit established precedent for denying the application of

D'Oench, Duhme in cases such as Fennells.

Even if one takes the position that the Fennells had oral agreements as opposed to agreements in writing with NCNB, then the evidence is sufficient to support the Jury finding that NCNB breach its oral agreement with the Fennells (an oral loan commitment is enforceable under Texas Law, § 26.01 and § 26.02); the oral agreement unambiguously supported by the writings found in the bank files, containing all the essential elements. The ruling in this case appears to be placing upon the Fennells a unique burden that is not provided for by statute or common law; that is, an agreement must be the same as a contract by definition. Black Law Dictionary defines an agreement as a:

> "meeting of two or more minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition. In law, a concord of understanding and intention between two or more parties with respect to the

> effect upon their relative rights and duties, of certain past or future facts or performances. The consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation. Although often used as synonymous with 'contract', agreement is a broader term; e.g. an agreement might lack an essential element of a contract. The bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. U.C.C. § 1-201; Uniform Consumer Credit Code, § 1.301(3)." Black's Law Dictionary (6th Edition).

The Fennells' proof meets or exceeds the requirements of an agreement. It must be noted that § 1823(e) provisions relate to an "**agreement in writing**" not a contract in writing (if Congress had intended contract, it would have said so).

The court opposed itself in its findings that the Fennells tried to circumvent the restrictions of § 1823(e) by arguing that they and NCNB reached an independent agreement. The hard evidence clearly showed that the Fennells reached

an independent agreement with NCNB. The elements of the agreement were the same as that reached with the failed bank, but it does not matter if these elements originated with Adam and Eve or the failed bank. Collard promised (on several occasions) and NCNB confirmed its promise in this case (in writing) to fund the Fennells a line of credit in the amount of $15,000.00 and a note in the amount of $26,625.00 under the same terms as outline in the minutes of the failed bank (to honor all agreements and contracts with FRB). Since NCNB (a bridge bank) and the Fennells did not condition the agreement upon the *D'Oench, Duhme*, neither can the court. Furthermore, the facts that NCNB was paid by the Taxpayers to accept **all the assets and liabilities of FRB**, the writings of NCNB provided to the Fennells (all agreements and contracts are still in force), and the promises made by NCNB through Collard are

all consistent with the Fennells' position and clearly inconsistent with the Appellate Court's findings.

The court's citation that the Fennells point to the Purchase and Assumption (P&A) Agreement is obvious error. The Fennells pointing to the P&A Agreement was only in the context of fraud. The Fennells cited that the P&A Agreement compared with the wording of the Private Letter Ruling #8835057 and the actual acts of NCNB were evidence of fraud. It appears the Appellate Court has confused the case at bar with the many prior cases that refer to provisions of the P&A Agreement, and by rote reliance adopted similar language.

As the Fennells pointed out in their briefs (pre and post trial), the P&A agreement is a contradiction to the Fennells' claim (assumption of certain assets and liabilities whereas the Private Letter Ruling is assumption of all

ment was not tied to the agreement the Fennells made with NCNB. **The Fennells proof of NCNB's promise was taken from NCNB's own authored document (presented to the Fennells five months after the P&A Agreement was signed) supported by affirmative testimony that NCNB was indeed the author and that the writing (Appendix "I") was sent to the Fennells and the Fennells acted in reliance upon the promises therein.**

The Appellate Court opposed itself in its findings with respect to the single occurrence that NCNB made promises to the Fennells that they would perform. The Fennells gave sworn testimony, as the record abundantly showed, that NCNB made promises to perform on other occasions, not just on the day (which would be sufficient to establish an agreement) NCNB assumed the assets and liabilities of FRBA. The Jury heard the occasions

error in recitation of the record further suggest that the Appellant Court did not review the record as required by its own rules.

The court opposed itself in its findings with respect to the issue that if the agreement between the Fennells and FRBA fails under § 1823(e) then the agreement between the Fennells and NCNB must also fail. There is no provision of statute nor common law that the strict requirements of § 1823(e) applies to a bridge bank in the context of its own agreement. The court's finding is contrary to the intent of Congress and is in opposition to the Fifth Circuit and Texas precedents as cited above. There is no law (statutory or common) that provides that agreements between borrowers and bridge banks must meet § 1823(e) [although Tex. Bus. & Com. Code Ann. § 26.02 (Vernon 1989) is similar but limits

application and mandates notice]. The only matter relevant is that NCNB agreed (a fact issue) and that the agreement is binding under Texas Law. The court's stated intent to protect the bridge bank and the FDIC from their own acts and relieve them of any promise(s) or representation(s) that the bridge bank or the FDIC makes is incredulous at best and denies the Fennells their rights provided by the Fourteenth Amendment. Although the Fifth Circuit understandably chose not to publish their opinion, nonetheless, it is precedent and it can now be argued that a bank's promise to lend cannot be enforced, which will be in **conflict with state contract laws and well as Tex. Bus. & Com. Code Ann. § 26.01 (Vernon 1987) and § 26.02 (Vernon 1989)**.

In the case at bar the Fifth Circuit Court can only be correct if the bridge bank or acquiring bank is silent in its

acceptance of the obligations contained in the "agreement in writing." To find otherwise would also deny the right of the bridge bank's freedom to contract [a provision of 12 U.S.C. 1821(n)(4)].

The statute is deafeningly silent on protection afforded the FDIC and the bridge bank with respect to commitments or representations either or both make. However, the statute is very loud and clear with respect to Congressional intent for the bridge bank to continue doing business as usual with credit worthy customer (creditworthiness was established at trial) such as the Fennells. The Fennells do not argue that an agreement that fails § 1823(e) can be enforced against the FDIC or bridge bank when these entities do not agree to be obligated on their own initiative or from negotiations with borrowers. Congress did not intend to provide the FDIC and the bridge bank a vehicle to escape all

liabilities even the ones created by the bridge bank such as NCNB. In fact such a provisions would disserve the public interest and the confidence of the banking system. The court was negligent in omitting the findings in *Security Bank v. Dalton*, 803 S.W.2d 443 (Tex. App.--Forth Worth 1991, no writ). The *Security* court found that evidence involving the material and relevant terms of agreements entered into between borrowers and an insolvent bank are admissible for the purpose of showing the state of mind of the new bank owners when they promised to continue to conduct business as usual. Nothing could be more clear of the intent of NCNB to continue doing business with the Fennells as usual in light of the Fennells credible testimony supported by NCNB's writings (Appendix "I" November, 1988 and Appendix "J" December 27, 1988). The Fennells do not argue the terms of the notes (nor do we argue who owned

what, although the notes are stamp to indicate some were owned by the Federal Reserve at relevant times) held by NCNB--we made no attempt to change or reduce the right of NCNB to the existing notes **in the absence of any wrong doing on their part**. The Fennells strongly urge that NCNB's breach is the sole cause for any actual reduction in the assets acquired. Had NCNB honored its commitment, this litigation would never have happened. It is appalling that NCNB by its own acts may be permitted to cause its assets to have less value than the assets had on the day NCNB took over and through May 12, 1989, then rely on *D'Oench, Duhme* or 12 U.S.C. 1823(e) to escape its responsibilities, and place the blame on the Fennells.

The Appellate Court opposed itself in its finding with respect to Collard's promise to the Fennells being given without consideration. In the appellate

court's attempt to circumvent the evidence, it appears that the Appellate Court did not execute a de novo review, thus, apparently overlooked the proof that the Fennells committed to give promissory notes and valuable security in exchange for the loans. These promised assets were maintained unimpaired from the date first promised until NCNB announced its breach on May 12, 1989. Further, the Fennells gave new promissory notes to NCNB supported by the security agreements for the renewals. The consideration given is the promissory note itself (including renewals) and the associated security agreement. However, the validity of the promise of two notes that never became assets to the banks or FDIC cannot be denied based on failure of consideration. The written documents found in the bank's integral loan file show what consideration was to be given in addition to promissory notes. The

Fennells' cannot be bound to give their consideration (only a promise to give promissory notes and security) prior to (or absent) the bank extending the loans. Failure of the banks to extend the two loans (notes #3 and #4) is the sole cause for the banks not to receive the security agreements and the promissory notes (consideration) promised by the Fennells.

Further, it was NCNB's determination that Fennells' continued payments on the notes was of sufficient value to NCNB that Collard conditioned their performance upon the Fennells keeping current on existing notes. This the Fennells did by using retirement funds with the understanding that Loan #3 would be funded and these funds would be reinvested in their retirement account. The Appellate Court seems to be of the opinion that a customer of a bank must give security and a promissory note, but the bank is not simultaneously obligated to fund. Fail-

ure of the banks to extend the two loans is the sole cause for the banks not to receive the security agreements and the promissory notes.

The appellate court again circumvented the evidence and opposed itself in its findings with respect to the line of credit lacking a rate of interest. Apparently the court failed to perform a de novo review thus it failed to consider the reading of the minutes which memorialized the agreement which NCNB promised, in writing and orally through Collard, to honor. Upon reading the minutes, one will find the following: "Wendell Fennell, $15,000 line of credit for 12 months at IFBA BR + 2% Variable" (lender's base rate plus 2%). This is obvious error of omission by the Fifth Circuit and is fatal to its findings and conclusion. However if the Fennells' proof had not been recorded (in writing), under Texas Law certain essential ele-

ments of a loan commitment can be establish (or inferred) based on a preexisting lender relationship, *Texas Farm Bureau Cotton Ass'n v. Stovall*, 253 S.W.2d 1101 (Tex. 1923); *Todd Shipyards Corp. v. Jasper Electric Service Co.*, 414 F.2d 8 (5th Cir. 1969). A preexisting relationship existed with NCNB, evidenced by the notes renewed by NCNB (same interest rate as the failed bank). However, the Jury was free to find from the evidence presented that all the essential elements were included in the written documents. The trial did not produce any valid evidence that the interest rate or any other element of the agreement was not settled.

The Fifth Circuit Panel is in essence ruling that the Statute of Frauds is applicable to a loan agreement that does not specify a loan closing date, which is contrary to Texas Law. When a loan agreement does not specify a time

for performance (date when the bank is to close loans) and when that performance can be done at the discretion of the bank (simple matter of preparing paper work), the Statute of Frauds is inapplicable. *C.S. Adams, Jr. v. BIG THREE INDUSTRIES, INC.*, 549 S.W.2d 411 (Tex. App.--Beaumont 1977). It was entirely within the FRB's and NCNB's control to prepare the closing documents and determine the closing date, just as FRB did with Loans #1 and #2. It is ironic that two of the loans (described in the loan agreement) used to purchase the bank's property were closed timely, yet two of the loans (described in the loan agreement) that were solely for the borrower's needs were not available at the same closing (all closing documents were 100% within FRB or NCNB control). Under the premise endorsed by the Fifth Circuit, a bank (failed or non-failed) can avoid liability by stalling/refusing the closing on some of

the loans (partial performance) that had occurred prior to the breach. When partial performance has occurred, the Statute of Frauds are inapplicable, thus, the issue of closing dates are not relevant.

NCNB first promised the loans to the Fennells on July 29, 1988, and that the loans would be funded as soon as possible. The closing was to occur based on NCNB preparing the paperwork (closing documents). Each time the Fennells requested the loans, Collard advised that funding would be timely completed (Collard would prepare the documents). NCNB is bound by its own promises and cannot be protected by the *D'Oench, Duhme*. Again, the Appellate Court apparently did not review the record.

The terms that are recorded in the case at bar are <u>maker, payee, principal amount, interest rate, terms of repayment, and maturity date</u>. All the essen-

tial terms are present in the bank minutes (including attachments by reference). NCNB agreed to these terms. The U. S. Court of Appeals for the Tenth Circuit in *National Farmers Organization, Inc. v. The Kinsley Bank*, 731 F.2d 1464 (10th Cir. 1984) allowed the Jury to decide whether a legally binding commitment existed where the essential business terms were lacking. The *Nat. Farmers Org. Inc., supra* court upheld the Jury finding of enforceable oral commitment. The maturity/renewal date (12 months) was clearly defined and stated in the minutes: "Wendell Fennell, $15,000 line of credit for 12 months at IFBA BR + 2% Variable" (lender's base rate plus 2%). All of the Fennells' FRB and NCNB notes (excluding home mortgages) were one year notes renewed annually or as needed to maintain the original amortization. Proof of this practice is found in the notes NCNB renewed and

Appendix "I."

All the essential terms were in the minutes as well as the memorandum to the senior loan committee and Collard's letter to the Fennells. However, if there is no provision for maturity dates in a loan agreement, then the court will supply this provision. See *Todd Shipyards Corp. v. Jasper Elect Service Co.*, 414 F.2d 8 (5th Cir. 1969).

Cases cited by the court, *Signs v. Bankers Life & Casualty Co.*, 340 S.W.2d 67 (Tex. Civ. App.--Dallas 1969, no writ) and *Bank of El Paso v. T.O. Stanley Boot Co.*, 847 S.W.2d 279 (Tex. 1992), simply do not apply to the Fennells proof; there are no missing essential terms. However, when time is not specified and a loan is secured by a lien, the Statute of Frauds is inapplicable, *West v. Barnes* 351 S.W.2d 615 (Civ. App. 1961).

9. The Appellate Court circumvented

the evidence (apparently failing to perform a de novo review) and opposed itself in its findings with respect to the amount of the loan (Loan #3). The reading of the minutes reveals the following: "Wendell L. Fennell and wife Celina Fennell, $26,625.00 loan for 12 months at IFBA BR +2% Variable" (lender's base rate plus 2%). The amount of the loan is unambiguous. The court appears to have confused the intended use of these funds with the amount of the loan. The court's findings are particularly repugnant in that there never was a loan in the amount $26,625.00 to renew or restructure (not with the failed bank nor NCNB). The $26,625.00 note fund were intended to pay off an existing note in the the approximate amounts of $24,900 and $1,800 toward the down payment on the bank's property. This fact is misstated by the court (and by the Fennells' former attorney) and is further evidence that

the court failed to review the record. The amount that the failed bank and NCNB agreed to fund is firm and remains the same from the date the agreement was prepared and signed by bank, to the occurrences when NCNB promised to extend the loan, and to the present. Collard knew that the funds were to replace other funds the Fennells had used from their savings accounts to pay the notes pending the bank's funding of Loan #3. This fact was acceptable to NCNB at the time (the loan was not conditioned on its intended use). Further, there was absolutely no substantial reduction in value of the security that the Fennells promised NCNB. The answer to the Appellate Court's reference to amortization period is found in Collard's letter to the Fennells dated February 8, 1988, and in the supporting memorandum to the Senior Loan Committee. Further this period is fixed by the amount of the payment shown in the analy-

sis accompanying the application and the application wording, "Payments to be adjusted annually so as to amortize the loan over the remaining life of the loan." The application was made a part of the agreement (minutes) by reference. This error is further evidence that the Appellate Court did not review the complete record.

The Appellate Court opposed itself in its findings with respect to judgment *n.o.v.* The court is correct only in the sense that the record is sufficiently complete for meaningful review. However, it is abundantly clear, based on the circumvention of the evidence, the Appellate Court could not have engaged in a meaningful review of the record. Since there were no findings of facts provided by the trial court, the trial court's position will remain somewhat of a mystery as to whether it adhered to the **clearly erroneous** standard for overturn-

ing the jury verdict.

Did the Appellate Court adhere to the **clearly erroneous** standard for overturning a jury verdict? The findings of the jury were strictly matters of fact--no question of law was presented to the jury nor were their answers responsive to matters of law. The findings that NCNB agreed to fund a note in the amount of $26,625.00 and a line of credit in the amount of $15,000.00 are strictly fact issues. The finding of breach of the agreement was also a fact issue. It simply is not rational to view the evidence (Appendices "D" through "J") and the testimony, then conclude that the jury verdict was **clearly erroneous**. The deference to the trier of fact is the rule not the exception and must not be disturbed even when other fact finders would have arrived at a different findings. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L.Ed

746, 68 S.Ct 525 (1948); *Wainwright v. Sykes*, 433 U.S. 72, 90, 53 L.Ed 2d 594, 97 S.Ct 2497 (1977).

The Appellate Court did not meet the standard for review as intended in *Boeing Co. v. Shipman, 411 F.2d 365, 375 (5th Cir. 1969) (en banc)*. The requirement that the record be reviewed in light most favorable to the Fennells is conspicuously absent. The Fennells' story and the documents contained in the bank's records would lead any reasonable person/juror to conclude that NCNB did breach its agreement with the Fennells. To the contrary it is clear that the evidence was viewed by the Appellate Court in favor of the FDIC/NCNB. The Fifth Circuit had a history of giving great deference to a Jury verdict, *Boeing, supra*; apparently this case is an exception.

The Appellate Court opposed itself in its findings with respect to the

introduction of the private letter ruling #8835057. The court findings do not address the Fennells' proof and claim that this evidence shows the intent of NCNB to commit fraud, another error of omission due to failure of the court to engage in a meaningful (substantially complete) review.

The Appellate Court opposed itself in its finding with respect to awarding of attorneys' fees. It remains inconsistent with the Jury's finding and nonsensical that a Jury would award attorney's fees to the prevailing party and at the same time find that the prevailing party must pay attorney's fees to the loser. It is ironic that this inconsistency is ignored by the Appellate Court and at the same time the court cites the Jury's finding to support NCNB, yet pours out the parts of the Jury's finding that is does not seem to find favor with.

The Appellate Court opposed itself in its finding that the agreement NCNB made was tied to § 1823(e). This finding is clearly opposed to the clear reading of the Statute. There is no provision in any section of Title 12 that provides protection to the bridge bank that the order of August 19, 1993 asserts. However, there are provisions in Title 12, § 1821(n)(3)(B) that the bridge bank should honor agreements credit worthy customers had with the failed bank. It is the intent of Congress that, in order to prevent unnecessary hardship or losses to the customers of any insured bank in default with respect to which a bridge bank is chartered, especially creditworthy farmers, small businesses, and households, the [**FDIC**] should

> (i) continue to honor commitments made by the bank in default to creditworthy customers, and
> (ii) not interrupt or terminate adequately secured loans which are

transferred under subparagraph (A) and are being repaid by the debtor in accordance with the terms of the loan instrument.

§ 1821(n)(3)(B) shows a clear intent to bind the bridge bank (in this case, NCNB) to honor commitments or agreements creditworthy customers had with failed banks. It was establish at trial that the Fennells were credit worthy customers. The Appellate Court apparently failed to consider this Statute as well as misapplying the provisions of § 1823(e) to the bridge bank. The court's expansion of the application of *D'Oench Duhme* doctrine is far beyond the scope intended by Congress. If Congress had intended for the bridge bank to be protected from its own agreements, it would have been a simple matter for the Statute to so read. The Appellate Court's conclusion of law is a major departure from the doctrine as articulated by the U. S. Supreme Court in the *D'Oench, Duhme* and *Langley* cases. The issue of protection against secret

side agreements with the failed bank has now grown to protection against any agreement, secret or otherwise, with the bridge bank. It is not the jurisdiction of the court to enact law or to expand law beyond and against the clear intent of Congress. The courts often point out that the codification of *D'Oench, Duhme* in § 1823(e) shows clear and compelling legislative support for the doctrine. Equally, should not the court find that the legislature does not support (in fact opposes) a finding that applies the doctrine to the bridge bank [§ 1821(n)(3)(B)] in the context of promises made by the bridge bank.

The Fifth Circuit's Order Affirming the District Court Order "concluding that the Fennells' defenses and claims are barred by the *D'Oench, Duhme* doctrine" is a perversion of the doctrine.

The District Court did not utter one word explaining its order. It is ironic

that the Fennells' request for Finding of Fact and Conclusion of Law was tersely denied, yet the Fifth Circuit without one word from the District Court has concluded that the District Court's Order was based on the *D'Oench Duhme* doctrine. This is an act of divining or guessing at what the District Court based its findings/conclusions upon. The Fennells do not argue that the Fifth Circuit can arrive at the same bottom line using a different path than the lower court. We argue that the Fifth Circuit simply does not know what path the lower court followed. It should be noted that the trial court also found that the FDIC was not a proper party when the same evidence was available to the court at the time of its sua sponte decision and at trial. This position taken by the trial court clearly indicated that the Fennells' case was outside the scope of the *D'Oench, Duhme* doctrine.

This entire case has been muddied from the beginning and as the U. S. Supreme Court indicated, where a district court's order is "opaque and unilluminating as to either the relevant facts or law" with respect to merits of a claim, an Appellate Court must refuse to affirm the order. *Carter v. Stanton*, 405 U.S. 669, 671 (1972).

The Fifth Circuit's finding with respect to the ability of the FDIC to entered into purchase and assumption agreements is inaccurate, arbitrary and capricious. The fact is the FDIC considered proposals in the FRB failure from three other parties that did not include provisions for assumption of all the assets and all the liabilities of the failed bank (or a tax free reorganization), thus not acquiring any right to apply the loss carry forward to their future taxable income. It is common knowledge that the FDIC in the FRB case

actually selected the most costly option available, NCNB.

Further, it is incredible that any court let alone an Appellate Court would find that any institution should be permitted to engage in fraud, misrepresentation, breach of agreement, etc., under the disguise of convenience in entering into purchase and assumption agreements.

The Appellate Court (in this case) now places the burden on borrowers to sacrifice their assets and inalienable rights so that any agreement between a borrower and a bridge bank cannot be enforce that may discourage future financial institutions from accepting the assets and liabilities of a failed bank.

Agreement With Failed Bank

The Fifth Circuit's opinion rendered in this case opposes itself and other circuits with respects to the interpretation and scope of § 1823(e). This con-

flict stems from what constitutes an agreement, what form the agreement must is in, was FRB bound by its writings, and what documents the agreement must be contained in.

When there is a writing, the accessibility of this writing is the doctrinal underpinning of the *D'Oench, Duhme* doctrine. However accessibility was not the issue in this case. The Appellate Court's opinion demands that the agreement must be recorded in the related promissory notes, whereas, in *Resolution Trust Corp. v. Oaks Apts. Joint Venture, supra,* the Fifth Circuit required that the recording be found in the integral loan file. The Fifth Circuit again denied the application of the draconian *D'Oench, Duhme* doctrine in *FDIC v. Laguarta, supra* for similar reasons. In *FDIC v. Laguarta* the Fifth Circuit held that an obligation to fund, found in a loan agreement (in essence the opinion in this case limits a

loan agreement to a promissory note), which was a separate document from the promissory note sued on was not barred by the *D'Oench, Duhme* doctrine.

A contradiction is also found in Appellate Court's recitation of the numerous recorded agreements in the Fennells' claim and proof. The court defined its point to argue as "unrecorded side agreements" then proceeded to cite numerous recorded agreements/documents in the Fennells' proof. It is assumed that because § 1823(e) requires only that the agreement be in writing that the use of the word recorded is synonymous with written.

The court opposed itself in its finding with respect to inferences drawn from conduct of the parties and is contrary to the Fennells claim and proof. In *Beighley v. FDIC*, 868 F.2d 776, 783 (5th Cir. 1989) the offer of proof of an agreement by the borrower was not in

writing and there were no committee minutes prepared by the bank, memorializing the agreement and signed by ten members of the Senior Loan Committee. The facts in *Beighley* do not permit a finding/conclusion as in *RTC v. Oaks* and *FDIC v. Laguarta*. The Fennells' claim and proof is based on the recorded (written) documents which constitutes the agreement, not just "conduct of the parties."

The Fennells would point out to this most honorable court that it is well establish law that when the FDIC and its assignees do not acquire any "right, title, or interest" in an asset that claims and defenses could "diminish or defeat", then the *D'Oench, Duhme* doctrine or specifically § 1823(e) clearly does not apply. This defense/protection does not extend to any agreement that does not go to an asset acquired under a failed bank scenario. The agreement memorialized in

the bank minutes provides for bank funding of four (4) loans. Only two of the loans were funded; therefore, the FDIC and the acquiring bank only acquired two assets which could possibly fall under the protection of the *D'Oench, Duhme* doctrine. The two loans (a note for $26,625 identified as loan #3 and a line of credit identified as loan #4) were not FRBA assets simply because they did not exist. FDIC acquired neither of these assets to be protected. Since the FDIC did not acquire these assets, NCNB surely did not as well. The Fennells were promised these loans by FRBA and NCNB, but no such loans were made; therefore, no such asset(s) exist(s). Therefore, *D'Oench, Duhme* does not apply rendering the court's finding and conclusion with respect to *D'Oench, Duhme* completely off point with respect to assets acquired. *FDIC v. Merchants Nat'l Bank*, 725 F.2d 634, 639 (11th Cir.), cert. denied 469

U.S. 829; *Agri Export Co-Op. v. Universal Sav. Ass'n*, 767 F. Supp 824 (S.D. Tex. 1991).

The Fennells would also show that (with respect to entire agreement) the Fifth Circuit has clearly and unequivocally establish that "when agreements between borrowers and lenders imposes mutual obligations to perform agreed-to-requirements, and the lender does not fully perform, *D'Oench, Duhme* will not bar the borrower from asserting claims or defenses based upon the failure of the lender to satisfy his respective obligations." *Resolution Trust Corp. v. Oaks Apts. Joint Venture, supra*. The agreement memorialized in the bank minutes precisely meets these conditions and cannot be barred by *D'Oench, Duhme*.

To understand the fundamental falsity/contradiction of the court's finding in this case with respect to the failed bank, one only needs to look at

the words on page five (5) of the order, "unrecorded side agreements." The court cited *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev.*, 992 F.2d 1398, 1404 n.9 (5th Cir. 1993); *Bell & Murphy & Assoc. v. Interfirst Bank Gateway*, 894 F.2d 750, 753-54 (5th Cir.), cert. denied, 498 U.S. 895, 111 S. Ct. 244, 112 L. Ed.2d 203 (1990); *Federal Sav. & Loan Ins. v. Two Rivers Associates*, 880 F.2d 1267, 1276 (11th Cir. 1989); *Franklin Asaph Ltd. Partnership v. F.D.I.C.*, 794 F. Supp. 402, 408 (D. D.C. 1992), as supporting the application of *D'Oench, Duhme*. These cases only apply where unrecorded or secret agreements are offered as proof, or in the alternative the writings do not show that the bank approved or promised to perform. It is ironic these same cases support the Fennells' position when the agreements are in writing, and unambiguously declare the bank's intent and approval of the funding as in the

case at bar. In, *Federal Sav. v. Two Rivers*, the court clearly recognizes the Fennells claim: "*D'Oench, Duhme* does not bar the assertion of defenses based on a bilateral obligations which appears in the bank's records. See *Howell v. Continental Credit Corp.*, 655 F.2d 743, 746 (7th Cir. 1981)." The Fennells note few similarities in the *Franklin Asaph* case. The facts makes this case easily distinguishable from the case at bar. The Fennells offered for proof and the Jury observed documents that were prepared and signed by the bank (the party charged). Although the Fennells did not sign the agreement, they executed by performance (and that performance was evidenced by matters in writing in the integral loan file, signed notes that were amortizing per schedule).

The findings in this case are at odds with Texas Law and the Fifth, Sixth, Seventh, and Eleventh Circuits.

See *Resolution Trust Corp. v. Oaks Apts. Joint Venture*, 966 F.2d 995,1000 (5th Cir. 1992); *FDIC v. Laguarta*, 939 F.2d 1231, 1238-39 (5th Cir. 1991); *FDIC v. Cremona @Co.*, 832 F.2d 959 (6th Cir. 1987), cert dismissed, 485 U.S. 1017 (1988); *Howell v. Continental Credit Corp.*, 655 F.2d 743, 746 (7th Cir. 1981); *FDIC v. Merchants Nat'l Bank*, 725 F.2d 634, 639 (11th Cir.), cert. denied 469 U.S. 829; *Augusta Dev. Co. v. Fish Oil Well Serv.*, 761 S.W.2d 538 (Tex. App.--Corpus Christi 1988, no writ); *Agri Export Co-Op. v. Universal Sav. Ass'n*, 767 F. Supp 824 (S.D. Tex. 1991).

The court opposed itself in its findings with respect to "execution" and when parties are "bound." The court's findings are against the well established law that the party preparing the agreement and signing the agreement cannot avoid performance because the other party was prevented from signing by the party

that prepared the agreement. Further, execution is achieved when the non-signing party performs pursuant to the terms of the agreement: An offer was made and accepted. Further, a writing need not be "signed" by both parties to constitute a contract, as long as the party not signing accepts the contract by acts, conduct, or acquiescence (the acts are evidenced by matters in writing located in the bank's integral loan file). *Augusta Dev. Co., supra.* The Sixth Circuit's decision in *FDIC v. Cremona Co, supra.*, held that where a document was prepared by the bank, the congressional purpose behind the requirement of contemporaneous execution by the bank is satisfied. Furthermore, when one party signs an instrument and the other party acquiesces and accepts the benefits, both parties are bound. *UNION NAT. BANK v. ORNELAS-GUTIERREZ*, 772 F.Supp. 962 (S.D. Tex. 1991).

It is abundantly clear that the minutes prepared by the bank and signed by ten members of the Senior Loan Committee (approving the funding) assisted in establishing Fennells' cause. The agreement memorialized in the minutes was executed contemporaneous with the acquiring of the related notes. It is also abundantly clear that the Fennells executed by their performance by signing and the giving (acceptance) of the promissory notes that were part of the agreement as memorialized in the minutes. The evidence that the Fennells executed is the promissory notes which were located in the bank's integral loan file. In this case both banks accepted the benefits of the Fennells' performance.

The court's citings remain off point or less than persuasive. Texas Law provides that a:

> valid memoranda of contract may consist of letters, telegrams and

other documents signed by party to be charged, which when read in conjunction, form basis of contract.

REPUBLIC BANKERS LIFE INS. CO. v. WOOD, 792 S.W.2D 768 (Tex. App.--Fort Worth 1990). The findings/conclusions in this case, when viewed in the context of the Fennells having a binding agreement with the failed bank (FRB), is completely without foundation in law or fact. The Fennells' offered proof was recorded agreements (in writing) obligating both FRBA (failed bank) and NCNB (bridge bank) independently.

This case is outrageous with respect to **fundamental fairness and the rule of law**. The Appellate Court has been so technocratic and blinded by a state of mind that thinks along the lines of the Presumptive Correctness doctrine that it apparently cannot discern the difference in this case and a case where a litigant is trying to circumvent liability for notes based on some secret agreement

(unrecorded) with a failed bank.

The position taken by the Fifth Circuit is so demanding and harsh that the Fennells argue that this appellate decision has reached to the extremes wherein it is demanded that adverse parties must be notified before the law can be enforced. Case in point is the provision of Tex. Bus. & Com. Code Ann. § 26.02 (Vernon 1989) that loan agreements must be in writing under certain conditions (i.e. less than $50,000.00 and non consumer type loans). However, for this law to be enforceable, notice is required, Tex. Bus. & Com. Code Ann. § 26.02 (Vernon 1989).

Likewise, based on the growth of the *D'Oench, Duhme* doctrine and the unique application in this case, the Fennells urge that notice is now demanded for procedural/fundamental due process, if the Fennells case becomes precedent. This growth has led to a tool for escape

rather than protection of the FDIC fund. The opinion in this case provides an escape for the bridge bank to such an extent that loan agreements entered into with borrowers can simply be evaded by the whims of the financial institution which made the agreement or any agreement notwithstanding its accessibility. It is particularly repugnant in this case because of the fraud that NCNB has been allowed to get away with (fraud based on NCNB's independent acts, not only FRB's).

The language in *Mackie, supra* is illuminating with respect to recorded agreements in the failed bank's files:

> "He can, however, assert defenses that are based on obligations contained in the written Loan Agreement, as long as he does not rely on any unrecorded agreements to support his allegations. FDIC v. Laguarta, 939 F.2d 1231, 1239 (5th Cir. 1991). Therefore, we remand Mackie's claims that Lamar breached the loan agreement, breached its duty of good faith, and violated the TDTPA to the district court."

The only difference in Mackie and the case at bar is the Jury has already

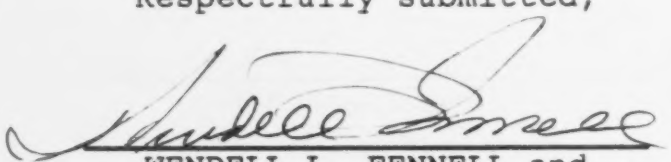
determined that an agreement existed with NCNB and it was breached by NCNB, but the Jury was not allowed to decide the issue in the context of the failed bank (FRB). Based on the finding in Mackie, the jury must be permitted to decide Fennells' claims and defenses to the notes with respect to the failed bank, FRB, also. The findings and conclusions of the Appellate court are so opposed to 5th Circuit precedents, that this U. S. Supreme must settle this contradiction.

CONCLUSION

The Opinion of the Fifth Circuit in this case, finding that *D'Oench, Duhme* bars the Fennells' claims, conflicts with *Resolution Trust Corporation v. Oaks Apts. Joint Venture, supra*, and *Security Bank, supra*, and others with respect to what documents found in the failed bank's file may constitute the "agreement in writing." Also, a conflict exist with the clear reading of § 1823(e) with

respect to agreements with the successor banks--the Fifth Circuit's opinion in this case broadens the doctrine to bar claims based on agreements with the successor bank. Further, there are conflicts with the opinion in this case and the U. S. Supreme Court related to the **clearly erroneous** standard for overturning a jury verdict, and there are conflicts with the Texas Contract Laws and Statute of Frauds. Therefore, based on the truth and the fundamental need to settle the gaping differences in precedent and failure to follow statutory mandates, Wendell Fennell and Celina Fennell pray that this most Honorable Court grant Writ of Certiorari,

Respectfully submitted,



WENDELL L. FENNELL and
CELINA T. FENNELL,
Petitioners
3141 Ivanhoe Lane
Abilene, Texas 79605
(915) 698-2421

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was mailed to Charles Black of WAGSTAFF, ALVIS, STUBBEMAN, SEAMSTER & LONGACRE, attorneys for NCNB (NATIONSBANK) and FDIC, at P. O. Box 360, Abilene, Texas 79604. The Fennells concede that the argument of the bank officers has merit with respect to waiver and suggest that they no longer have an interest in this case; however, a copy is sent for their consideration to Peter Sheridan of NUNN, GRIGGS, WETSEL & JONES, attorneys for the individual bank officers, at P. O. Box 488, Sweetwater, Texas 79556 on this 8th day of December, 1993.

WENDELL FENNELL

APPENDIX "A"

UNITED STATES DISTRICT COURT OF
APPEALS For the Fifth Circuit

No. 92-1486

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY,

Plaintiff-Appellee,

VERSUS

WENDELL L. FENNELL AND CELINA T. FENNELL,

Defendants and Third-Party
Plaintiffs--Appellants,

VERSUS

NATIONSBANK OF TEXAS, INC.,
FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER OF FIRST REPUBLICBANK
ABILENE, N.A.,

AND

TIM COLLARD; JOHN CLARK; and JOHN COMBS,

Third-Party Defendants--Appellees.

Appeals from the United States
District Court for the Northern District
of Texas

(CA-1-90-122-C c/w CA-1-91-119)

Before GOLDBERG, HIGGINBOTHAM, and DAVIS,
Circuit Judges.

PER CURIAM:[1]

I

Wendell and Celina Fennell (the Fennells) appeal district court rulings holding them liable for the amounts due on four promissory notes, and dismissing their claims against the Federal Deposit Insurance Corporation as receiver of First RepublicBank Abilene, N.A. (FRBA) (FDIC-Receiver), the FDIC in its corporate capacity (FDIC-Corporate), NationsBank of Texas, N.A. (NCNB), and various officers of the banks. Concluding that the Fennells' defenses and claims are barred by the D'Oench Duhme doctrine, we affirm.

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1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

II

The FDIC, in its corporate capacity, currently holds four promissory notes executed by the Fennells and originally made payable to Interfirst Bank Abilene, N.A., which later became Firstrepublic Bank Abilene, N.A. (FRBA). When FRBA failed in 1988, the FDIC was appointed Receiver. Under a purchase and assumption agreement, the FDIC-Receiver assigned certain assets and liabilities, including the notes at issue, to JRB Bank, N.A., a bridge bank organized under 12 U.S.C. § 1813 (i)(2). JRB Bank later became NCNB Texas National Bank (NCNB). Later, NCNB assigned the promissory notes to the FDIC-Corporate.

The Fennells maintain that they are not liable on the notes. Rather, they argue, they are entitled to damages from NCNB, the FDIC-Receiver, and the FDIC-Corporate for fraud, breach of contract, and wrongful foreclosure. The Fennells

also seek to recover damages from Tim Collard, John Clark, and John Combs, who were officers at FRBA and, later, at NCNB.

Three of the notes at issue were executed before 1987. The parties refer to them as the quadraplex note, the Fairway Oaks note, and the oil and gas note. The fourth note, executed in 1987, lies at the center of the controversy. the parties refer to it as the Hoylake note.

The Fennells claim that they purchased the Hoylake property, a nonperforming asset, from FRBA in exchange for FRBA's promise to restructure the oil and gas note and extend to the Fennells a $15,000 line of credit. According to the Fennells, FRBA did not restructure the oil and gas note or extend the line of credit. The Fennells further contend that when FRBA failed, NCNB promised to fulfill FRBA's end of

the agreement, but did not.

In 1989, when the Fennells' defaulted on the four promissory notes, NCNB filed this suit in Texas state court for collection of amounts due. The Fennells filed third party actions against Collard, Clark, and Combs, and counterclaims against NCNB and the FDIC. The Fennells' claims and counterclaims alleged fraud, real estate fraud, Deceptive Trade Practices Act violations, wrongful foreclosure, and breach of contract. The suit was subsequently removed to federal court. The FDIC, in its corporate capacity, was substituted as plaintiff when it received the notes at issue assignment from NCNB.

The case proceeded to trial. After the Fennells presented their case to the jury, the district court granted, in part, the FDIC's motion for judgment as a matter of law, finding the Fennells liable for the amount due on the notes,

and ruling that the Fennells take nothing against the FDIC. The court also granted, in part, NCNB's motion for judgment as a matter of law, ruling that the Fennells take nothing against NCNB on all but the Fennells' breach of contract claim. Furthermore, it entered a take-noting judgment in favor of Clark and Combs on all theories alleged and in favor of Collard on all theories alleged except as to the fraud theory.

The jury found against NCNB on the Fennells' breach of contract claim, and awarded damages of $377,000. In addition, the jury awarded the Fennells attorneys' feed of $35,000. The jury also awarded $102,913.53 in attorneys' fees to the FDIC for collection on the notes. The jury found against the Fennells on their fraud claim against Collard.

The district court granted NCNB's motion for judgment NOV on the breach of

contract claim. It also denied the Fennells' motion for judgment NOV on the attorneys' fee award to the FDIC. The court denied the Fennells' motions for relief from judgment, for entry of findings of fact and conclusions of law, and for a new trial. This appeal followed.

III.

A.

The Fennells first challenge the propriety of the district court's rulings dismissing the Fennells' claims against NCNB and the FDIC, and finding them liable to the FDIC for the amounts due on the notes. Under the D'Oench Duhme doctrine, codified at 12 U.S.C. § 1823(e), the rulings were proper. That statue provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as

> receiver of any insured depository institution, shall be valid against the Corporation unless such agreement-
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been continuously, from the time of its execution, an official record of the depository institution.

Section 1823(e) protects the FDIC-corporate, the FDIC-Receiver, and bridge banks from defenses and affirmative claims based on unrecorded side agreements to extend future loans. Resolution Trust v. Sharif-Munir-Davidson Dev., 992 F.2d 1398, 1404 n.9 (5th Cir. 1993); Bell & Murphy & Assoc. v. Interfirst Bank Gateway, 894 F.2d 750, 753-54 (5th Cir.),

cert. denied, 498 U.S. 895, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990). all of the Fennells' claims and defenses against the FDIC and NCNB are premised on an "agreement" to extend a line of credit and restructure an existing loan "which tends to diminish or defeat" the FDIC's interest in the four promissory notes. Thus, all of these claims and defenses fall if the agreement does not satisfy the requirements of § 1823(e).

We agree with the FDIC and NCNB that the Fennells' claims and defenses against the FDIc and NCNB cannot succeed because of the lack of a written agreement between the Fennells and FRBA. The Fennells point to the following as evidence of an agreement between the Fennells and FRBA: (1) oral conversations between the Fennells, Collard and Clark that took place before and after the Fennells signed the Hoylake note; (2) the Fennells' written offer for the Hoylake

property, which was "contingent upon financing as we discussed;" (3) a memorandum to FRBA's senior loan committee in which Collard proposed a restructuring of the oil and gas note, and proposed the extension of a $15,000 line of credit to the Fennells;[1] (4) minutes of an April,

---

2.The memorandum outlined the following loans:

1. The Hoylake Loan. This loan in the amount of $144,000 would provide the funds to purchase the Hoylake Property and would be secured by the Hoylake Property;

2. The Quadraplex Loan. this loan in the amount of $150,800 would renew and increase (by $14,286) the Quadraplex Note and the increase would provide part of the down payment for the Hoylake Property, and would remain secured by the Quadraplex;

3. The Oil and Gas Loan. This loan in the amount of $26,625 would renew and increase (by $1,8000) (sic) the Oil and Gas Note and the increase would provide a portion of the down payment for the Hoylake Property, and would be secured by previously pledged oil and gas properties and by a deed of trust on the Fennells' existing home on Ivanhoe (the "Ivanhoe Property"), and would reduce the monthly payments from $1550 to $360; and

4. The Line of Credit Loan. This loan

1987 meeting in which FRBA's senior loan committee approved the loans as proposed in Collard's memorandum; and (5) a letter from Collard to the Fennells, dated 10 months after the execution of the Hoylake note, in which Collard purports to "outline the refinancing/home acquisition financing package approved by our bank."

The Fennells argue, in effect, that a fact finder could infer from the above evidence an agreement that meets § 1823(e)'s requirements. We have held, however, that inferences that can be drawn from conduct of the parties do not satisfy § 1823(e)'s writing requirement. Beighley v. Federal Deposit Ins. Corp., 868 F.2d 776, 783 (5th Cir. 1989). Moreover, to satisfy § 1823(e), the

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...Continued...

would be a one year line of credit for working capital in the amount of $15,000, which would have to be paid to zero for thirty days during the one year term, and would be secured by the Smith-Newton-McMillon lease.

Fennells must do more that point to a written document expressing FRBA's intent to restructure a note and extend additional credit; the writing must obligate FRBA to do so. Federal Sav. & Loan Ins. v. Two Rivers Associates, 880 F.2d 1267, 1276 (11th Cir. 1989); see also Franklin Asaph Ltd. Partnership v. F.D.I.C., 794 F. Supp. 402, 408 (D. D.C. 1992) (Section 1823 (e)'s writing requirement not met by unexecuted loan documents or by bank's files reflecting loan committee's approval of loan). Although the loan committee approved the loan restructuring and line of credit sought by the Fennells, no Written agreement to that effect was executed by the Fennells and FRBA. Nor did Hoylake note make any reference to this agreement. The district court correctly concluded that the agreement does not satisfy § 1823(e).

B.

The Fennells next try to circumvent

the restrictions of §1823(e) by arguing that they and NCNB reached an independent agreement that NCNB would restructure the oil and gas note and extend to the Fennells a $15,000 line of credit. For evidence of this alleged agreement, the Fennells point to (1) the purchase and assumption agreement under which NCNB acquired the assets and liabilities of FRBA from the FDIC-Receiver; (2) NCNB's promises, through its newsletter, that "The current terms of your [FRBA Bank] loan will not change at NCNB Texas," and that "All contracts and other agreements are still in force;" and (3) Collard's oral promise to the Fennells, on the day NCNB assumed the assets and liabilities of FRBA, that "everything was going to be fine."

As to the first two items, NCNB and the FDIC argue that if the agreement between the Fennells and FRBA fails under § 1823(e), that agreement is not a

liability assumed by NCNB from FDIC as Receiver for FRBA. We agree; to hold otherwise would leave bridge banks effectively unprotected by D'Oench Duhme, and, consequently, would severely restrict the FDIC's ability to work out purchase and assumption agreements with bridge banks. Porras v. Petroplex Sav. Ass'n, 903 F.2d 379, 380 (5th Cir. 1990); Pernie Bailey Drilling Co. v. FDIC, 905 F2d 78, 80 (5th Cir. 1990)

Collard's alleged promise to the Fennells, by itself, does not support the existence of an agreement with NCNB because no consideration was given for Collard's promise. The Fennells argue that their continued performance under the loan agreements constitutes consideration. This argument has no merit because, as we have previously discussed, the Fennells were already obligated to perform under the loan agreements. Signs v. Bankers Life & Casualty Company, 340

S.W.2d 67, 73 (Tex. Civ. App. 1960). Not only did the alleged agreement lack fresh consideration, but it lacked such material terms as the maturity date of the loan, the interest rate, and the repayment terms. Even if we accept the Fennells' argument that the alleged agreement adopted the terms negotiated by the Fennells and FRBA, the part of the alleged agreement dealing with the line of credit lacks a rate of interest, a loan closing date, and a maturity date. The part of the alleged agreement dealing with the commitment to restructure the oil and gas lease would also require future negotiation; when NCNB acquired FRBA's assets, there was no longer $26,625 of debt to restructure, and the contemplated amortization period for the oil and gas note in April of 1987 could not apply to the remaining balance due in November of 1988. So the agreement fails for the additional reasons that it lacks

essential terms. T. O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

C.

The Fennells next argue that the district court erred in ruling on the motions for directed verdict and judgment NOV without making findings of fact and conclusions of law. This argument has no merit. Fed. R. Civ. P. 52 requires the entry of findings of fact "[i]n all actions tried upon the facts **without a jury** or with an advisory jury" (emphasis added). However, Rule 52 makes no such requirement with respect to any other motion: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion...." The Fennells appeals to "fundamental fairness" are similarly unavailing; the record is adequate for meaningful review of the district court's rulings.

D.

The Fennells next argue that the district court erred in refusing to let them introduce a private letter ruling requested by NCNB and handed down by the Internal Revenue Service. The private letter ruling says that a buyer bank that accepts "all the assets and liabilities" of a failed bank can receive the tax advantages of the loss carry forwards of the failed bank. The Fennells sought to use the letter to show that NCNB obtained tax advantages without assuming FRBA's obligations to the Fennells. The district court concluded that the Fennells were attempting to "bootstrap" themselves into a third party beneficiary position.

The district court correctly excluded the private letter ruling because it is irrelevant to any material issue in the case. As has already been discussed, the agreement asserted by the Fennells fails the requirements of 12

U.S.C. § 1823(e). Therefore it was not a liability assumed by the NCNB.

E.

The Fennells next argue that the district court erred in awarding the FDIc $102,943.53 in attorneys' fees consistent with the jury verdict. First, they argue, the FDIc joined the lawsuit only three months before trial. Second, they argue that the jury's verdict indicates that the jury mistakenly believed that NCNB would be liable to the FDIC for the attorneys' fees. Finally, they argue that the district court failed to instruct the jury to segregate amounts spent collecting on the notes from amount spent defending the Fennells' counterclaims.

The first two arguments have no merit. Both the terms of the promissory notes and Texas statute provide for the payment of reasonable attorneys' fees expended in collected the notes. Tex.

Civ. Prac. & Rem. Code Ann. § 38.01 (Vernon 1986). Thus liability for attorneys' fees flows automatically from a finding of liability on the notes. The jury's only task was to determine the amount to be awarded, and the relevant jury interrogatory asked only that it determine the amount. The Fennell's third argument likewise has no merit. The Fennells did not argue at trial through a motion for directed verdict or otherwise that the attorneys' fees should be segregated. Fed. R. Civ. P. 50(b); Seidman v. American Airlines, Inc., 923 F.2d 1134, 1137-38 (5th Cir. 1991).

Finally, the Fennells challenge the take nothing judgment entered on their claims against Collard, Clark, and Combs. The jury considered and rejected the Fennells' fraud claim against Collard. However, the district court dismissed the remaining claims against the three defendants as a matter of law.

Collard, Clark and Combs argue that the Fennells' brief fails to point to any evidence that creates a jury issue on any of the Fennells' claims against them, except the fraud claim against Collard. they argue that this failure to comply with F.R.A.P. Rule 28(a)'s requirement that the appellant's argument "contain the contentions of the appellant with respect to the issues presented, and the reasons therefore, "results in a waiver of those arguments. We agree. The Fennells have waived their claims except for their real estate fraud claim against Collard. Mater of Texas Mortg. Services Corp., 761 F.2d 1068, 1073 (5th Cir. 1985). However, Collard correctly points out that real estate fraud is a subset of common law fraud. Bykowicz v. Pulte Home Corp., 950 F.2d 1046, 1050 (5th Cir.), cert denied, ____U.S.____, 113 S. Ct. 73, 121 L. Ed.2d 38 (1992). So the jury's amply supported finding that Collard did

not commit common law fraud effectively disposes of the real estate fraud claim.[1]

IV.

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT OF APPEALS For the Fifth Circuit

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No. 92-1486

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY,

Plaintiff-Appellee,

VERSUS

WENDELL L. FENNELL AND CELINA T. FENNELL,

Defendants and Third-Party Plaintiffs--Appellants,

VERSUS

NATIONSBANK OF TEXAS, INC., FEDERAL DEPOSIT INSURANCE CORPORATION,

---

3.Our disposition of the preceding issues makes it unnecessary to address the parties' arguments concerning the proper measure of damages in this case.

AS RECEIVER OF FIRST REPUBLICBANK
_ABILENE, N.A.,

AND

TIM COLLARD; JOHN CLARK; and JOHN COMBS,

Third-Party Defendants--Appellees.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(September 15, 1993)

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

FEDERAL DEPOSIT INSURANCE	§
CORPORATION, IN ITS	§
CORPORATE CAPACITY,	§
	§
Plaintiff,	§
	§

v.	§	
	§	
WENDELL L. FENNELL and	§	
CELINA T. FENNELL,	§	
	§	
Defendants and	§	
Third-Party Plaintiffs,	§	
	§	
v.	§	
	§	
NATIONSBANK OF TEXAS,	§	
N.A.; and FEDERAL DEPOSIT	§	
INSURANCE CORPORATION,	§	
AS RECEIVER OF FIRST	§	
REPUBLICBANK ABILENE, N.A.,	§	
	§	
Counter-Defendants	§	
	§	
and	§	
	§	
TIM COLLARD; JOHN CLARK;	§	Civil
and JOHN COMBS,	§	Action
	§	CA 1-90-
Third-Party Defendants.	§	022-C

JUDGMENT

The above-styled and -numbered cause came on for trial. The parties announced ready. A jury was duly qualified and empaneled.

During the presentation of the case on behalf of Plaintiff, Federal Deposit Insurance Corporation, in its Corporate Capacity, stipulations were read and evidence presented concerning the balance due and owing on the four promissory

notes in question by Wendell L. Fennell and Celina T. Fennell. Following the presentation of the evidence, on behalf of the Defendants and Third-Party Plaintiffs, Wendell L. Fennell and Celina T. Fennell, the Court, following the presentation of motions for judgment as a matter of law, granted the motion as to the amounts owing on the four promissory notes by the Fennells to Federal Deposit Insurance Corporation in its Corporate Capacity. Also, the Court granted the motion for judgment that the Fennells take nothing as against FDIC, Receiver of First RepublicBank Abilene, N.A. The Court also granted the motion in favor of NationsBank of Texas, N.A. in that the Fennells would take nothing as against it on all claims except the breach of contract theory. Furthermore, the Court granted the motion for judgment as a matter of law that the Fennells take nothing as against John Clark and John

Combs on all theories alleged and as against Tim Collard on all theories alleged except as to the fraud theory.

Jury questions were submitted as to reasonable and necessary attorney fees incurred by FDIC in its Corporate Capacity, as to the Fennells' breach of contract claims against NationsBank, and as to the Fennells' claims against Tim Collard on the fraud theory.

After hearing the testimony and argument of counsel, the jury retired to consider their verdict. Upon completion of their deliberations, the jury returned into open court their verdict, which was accepted by the Court and ordered filed with the other papers of this cause. The verdict is referred to and incorporated herein as if set forth in full.

Post-trial Rule 50 motions for judgment were presented to the Court, along with supporting briefs. The Fennells' motion for judgment notwithstand-

ing the jury verdict on the issue of attorney fees to be awarded to FDIC in its Corporate Capacity was denied. The motion for judgment notwithstanding the jury verdict filed on behalf of Nations-Bank of Texas, N.A. was granted.

Therefore, based upon the prior rulings of the Court and based upon the jury verdict as to attorney fees to be awarded to Federal Deposit Insurance Corporation in its Corporate Capacity, the Court renders the following judgment.

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff, Federal Deposit Insurance Corporation, in its Corporate Capacity, do have and recover of and from Wendell L. Fennell and Celina T. Fennell, jointly and severally, in the sum of $74,628.77, plus prejudgment interest in the amount of $10.34 per diem from March16, 1992, until the date of this judgment, plus attorney fees in the amount of $102,943.53, and against Wen-

dell Fennell in the additional sum of $8,748.69, plus interest in the amount of $2.2424 per diem from March 16, 1992, until the date of this judgment, plus post-judgment interest at the rate of 4.55 percent per annum. All court costs incurred by Federal Deposit Insurance Corporation in its Corporate Capacity are taxed against Wendell L. Fennell and Celina T. Fennell.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Wendell L. Fennell and Celina T. Fennell take nothing as against NationsBank of Texas, N.A., Federal Deposit Insurance Corporation, as Receiver of First RepublicBank Abilene, N.A., Tim Collard, John Clark, and John Combs. Court costs incurred by NationsBank of Texas, N.A., Federal Deposit Insurance Corporation, as Receiver of First RepublicBank Abilene, N. A., Tim Collard, John Clark, and John Combs are taxed against Wendell L. Fennell and Celina T.

Fennell.

The Clerk shall furnish a copy hereof to each attorney of record.

Signed this 15th day of April, 1992.

SAM R. CUMMINGS
United States District Judge

APPENDIX "D"

A Report of Call on Wendell Fennell (page 452 of banks loan file) dated April 9, 1987:

"The ARO met with Wendell and discussed the possibility of IFBA restructuring his debt along with potential purchase of some other real estate which is presently owned by IFB South Abilene. I indicated to Wendell that I would introduce him to John Clark, who is now handling the ORE of Interfirst South and we would take a serious look at the proposal, which would include IFBA financing the purchase."

APPENDIX "E"

A letter from Wendell Fennell to John Clark, loan officer, dated April 13, 1987:

"I wish to make a proposed offer of $160,000 for the property, with all improvements described as #41 Hoylake, located in the Fairway Oaks Addition. This proposed offer is contingent upon financing as we discussed."

APPENDIX "F"

A memo from Tim Collard, Accounts Review Officer, (ARO) to Senior Loan Committee dated April 24, 1987 (page 532-536 of bank's loan file) quoted as follows:

"This memorandum will support the recommendation for the four loan applications attached. Wendell Fennell has been a customer of IFBA for several years and our credit extended to him has exceeded $250M, and has always performed as agreed. The majority of our debt

(present balance: $136.5M) is secured by a quadraplex (located at 3117 Buttonwillow), the remaining debt is secured by a pumpjack ($5.4M), the Key Estate (Gas) lease ($24.9M) and a Fairway Oaks Lot ($27.5M); all of these are amortizing monthly.

NEW LOAN REQUEST

Mr. Fennell has proposed to purchase the home located at 41 Hoylake, presently owned by Interfirst Bank South Abilene, for a total price of $160M; requiring a loan of $144M ($16M will be paid as a down payment). Mr. Fennell requested "market rate", 15 year financing for the house, and no "points" will be charged.

LOAN NO. 1 ($144M) is for the purpose of purchasing the home with an interest rate of TCB Houston Prime + 2%, fixed for one year, adjusted annually. the recent Ron Rynders appraisal dated 02-18-87 reveals a value of $186M, yielding an LTV ration of 77.4%.

LOAN NO. 2 ($150.8M) is a renewal with increase of the existing loan (present balance $136.5M) secured by the quadraplex, with an increase of $14,261 to be used for a cash down payment on the 41 Hoylake homestead. This loan would be placed on a 15 year amortization, on one year notes, with payments to be adjusted annually based on prevailing interest rates sop as to amortize the loan over the remaining life of the loan. A new H.P. Hawkins appraisal reveals a deteriorated value of $188.5M (was $200M) even though occupancy and rents have been steady. Presently, all four units are occupied with gross monthly rents totaling $2,040.

LOAN NO. 3 ($26,625) will renew an exist-

ing loan (present balance $24.9M) and provide for a small portion of the down payment on the Hoylake property ($1.8M). The existing note is secured by a 1st lien D/T and assignment of production on the Key estate lease, which is producing net monthly gas revenue of $1.1M per month. the proposed loan will be secured by both the existing gas property and by a 2nd lien on Mr. Fennell's house located at 3141 Ivanhoe; he will convert this house to rent house. He has two potential renters (subject to this approval) at $600 per month. Mr. Fennell indicated that within the next few years, assuming that the Abilene housing market improves, he would probably sell the Ivanhoe home, which he believes is worth around $100M.

LOAN NO. 4 ($15,000) will provide Mr. Fennell a small amount of working capital with which to acquire future oil and gas lease prospects for drilling or selling. during the past 12-18 months, Mr. Fennell has devoted much of his time to a property called the Newton-Smith-McMillan (N-S-Mc), which has proven to be his best property. Acquired out of bankruptcy, this 7-well lease (5 producing oil wells, and 2 disposal/injector wells) makes oil revenue attributable to Mr. Fennell's interest averaging $1,547 per month during the past 12 months. Further, Mr. Fennell owns all of the SWD wells for which he receives an average monthly income of $1,300. Mr. Fennell is the operator on this entire unit, for which he receives $1,500 per month in operating fees (5 wells, $300 per month per well). Mr. Fennell will be pledging this unit to us as collateral for the line of credit. While we do not have an engineering study on the property, there is obvious value due to the monthly net revenue attributed to Mr. Fennell.

FINANCIAL STATEMENT

The financial statement of Wendell and Celina Fennell reveals a good income for both individuals and relatively large concentration of assets in real estate, some of which is income producing. Mr. Fennell has monthly oil and oil-related income of $4.5M per month and rental income averaging $2,640 per month. Celina Fennell is a Dietitian at Humana Hospital and earns a gross monthly salary of $2,940 and also has a respectable savings accumulated in Humana's savings plan of approximately $32M. Exhibit "A" details a monthly cash flow projection based both on existing and proposed debt service and applicable rental income projections.

SUMMARY AND RECOMMENDATIONS

The Fennells demonstrate a moderate degree of liquidity and their income is respectable and certainly adequate to support the level of debt incurred in this proposal. while it was not mentioned in the applications, the ARO feels it would be appropriate to receive $200M to $250M in term life insurance on Mr. Fennell, since his ability and income play a major role in the repayment of this debt.

Admittedly, this is not the best credit proposal, but with adequate cash flow, Mr. Fennell's prior performance record (which has been very good) and the desire to remove a property from a non-producing category, the ARO believes that this is a good proposal for the bank. Further, each loan is well-secured and structured in a normal, conforming manner.

WENDELL FENNELL INCOME/DEBT SERVICE

		Income
Wendell Fennell		
Operating/Prof. fees		$1,500
Equip. rental		
*Pumpjack	600	
Exec. Suite rental	607	$1,207
Oil and Gas Income		
*Key Estate	$1,100	
N-S	1,547	
SWD	1,300	3,950
Rental Income		
Exec. Suite	600	
*Quadraplex	2,040	
Ivanhoe	600	3,240
Subtotal		9,897
Celina Fennell		
Salary (net)		2,340
Total Revenue		12,267

Applicable Debt Service

	Existing	Proposed
Pumpjack	400	400
N-S	1,550 (incl. in Ivanhoe)	
Quadraplex	1,972	1,667
Ivanhoe	360	716
Non-income producing		
Frwys Lot	667	667
Hoylake	-	1,526
Vehicle Leases (2)	825	825
Insurance/Taxes	600	950
Total	6.374	6.751
Excess	5.293	5.516**
Coverage	1.83x	1.82x

*denotes property pledged to IFBA

** While this figure does not include miscellaneous expenses, it is after taking into account home mortgage payments, vehicle lease expense; and insurance and taxes on all properties.

Assuming that Mr. Fennell is unable to lease his Ivanhoe "rent home", the excess

cash flow would be $4,916, yielding a still-acceptable debt service coverage ration of 1.73x" (end of quote p. 532-536)

APPENDIX "G"

Minutes of the Senior Loan Committee, InterFirst Bank Abilene, N.A. dated April 24, 1987 (signed by ten voting members). Quoted as follows:

THE COMMITTEE APPROVED THE FOLLOWING APPLICATIONS:
Wendell Fennell et ux Celina Fennell, $144,000 loan for 180 months at 9.75% first year adjusted annually at TCB Houston BR + 2%. The funds from this loan, secured by 1st lien D/T on 41 Hoylake valued per Ron Rynders SRA appraisal dated 2/18/87 = $186,000, were used to purchase homestead located at 41 Hoylake (purchase price $160,000). This loan will be repaid from income. This loan was approved by voice vote after a motion by John Combs and a second by John Clark under the following conditions: obtain insurance. TWC

Wendell Fennell and wife Celina Fennell, $150,800 renewal with increase of $14,261 for 12 months at IFBA BR + 2% Variable. The funds from this loan, secured by 1st lien D/T on 3117 Buttonwillow quadraplex described as lot 103, replat of lot 1, blk. 4A, sec. 1, Buttonwillow Parkway Addition to Taylor County, Texas, valued per H.P. Hawkins MAI appraisal dated 4/15/87 = $188,500, were originally used to purchase a quadraplex located at 3117 Buttonwillow and increase of $14,261 used for down payment on 41 Hoylake. This loan will be repaid from rental income or income of Wendell and Celina Fennell. This loan was approved by voice vote after a motion by John Combs and a second

by John Clark under the following condition: obtain insurance. TWC

Wendell L. Fennell and wife Celina Fennell, $26,625 loan for 12 months at IFBA BR + 2% Variable. The funds from this loan, secured by 2nd lien D/T on 3141 Ivanhoe, described as lot 12, blk 6, sec. 2, High Meadows Addition, Abilene, Taylor County, Texas valued per Central Tax Authority listing 1986 = 87,866 less 1st lien to United Capital Mortgage, Houston = $43,280 total value = $44,586 and 1st lien D/T and assignment of production on Key Estate lease, Taylor County, Texas with the reserve study waived, were used to recast existing debt styled Wendell Fennell (present balance = $24,866) and provide for down payment on 41 Hoylake of $1,759. This loan will be repaid from rental income or income of borrower. This loan was approved by voice vote after a motion by John Combs and a second by John Clark under the following condition: obtain insurance. TWC

Wendell Fennell, $15,000 line of credit for 12 months at IFBA BR + 2% Variable. the funds from this loan, secured by 1st lien D/T and assignment of production on Newton-Smith-McMillan leases in Coleman County, Texas with reserve study waived, were used to acquire leases for drilling or sale. this loan will be repaid from sale or drilling of prospects or oil an gas income. This loan was approved by voice vote after a motion by John Combs and a second by John Clark under the following condition: obtain insurance. TWC
END OF QUOTE

APPENDIX "H"

A letter dated February 8, 1988, from First RepublicBank, signed by Tim

Collard (ARO), to Wendell Fennell (page 000135-000136 of bank's loan file). Text quoted:

"As you requested, the following will outline the refinancing/home acquisition financing package approved by our bank on April 24, 1987.

Loan No. 1:
$144,000, used to purchase (and is secured by) a home located at 41 Hoylake, calling for level monthly payments of $1525.48 including interest, which the interest rate and payment amount adjusted annually based on changes in the variable base rate of Texas Commerce Bank, Houston, as specified in said note.

Loan No. 2:
$150,800, a renewal (with increase of $16,077.96 used to make down payment on 41 Hoylake homestead), originally used to acquire and secured by a quadraplex located at 3117 Buttonwillow, calling for level monthly payments of $1,667.00 including interest, with payment amount to be adjusted annually to amortize the loan balance over the remainder of the 15 year amortization period.

Loan No. 3:
$26,625, a renewal with increase of $1,759.00 to be used for a portion of the down payment on 41 Hoylake. This loan proposal requested the renewal and restructure of the indebtedness secured by the Key Estate Lease, calling for the additional pledge of a 2nd lien on your former home located at 3141 Ivanhoe (which was to be converted into a rent home). The restructured payment was to be $360. per month including interest, with payments to be adjusted annually so as to amortize the balance of the loan

over the remainder of the original 10 year amortization period.

Loan No. 4:
$15,000 line of credit to be used to acquire leases for drilling or sale. This note called for monthly interest payments and a 30 day annual "clean-up" period (during which a $0 balance would have to be maintained). This credit facility was to be secured by a 1st lien Deed of Trust and Assignment of Production on the Newton-Smith-McMillan Leases.

As you requested, we would like to clarify the sale to you of the property located at 41 Hoylake, which InterFirst Bank South Abilene had foreclosed. InterFirst Bank South Abilene made no representation that a membership in Fairway Oaks Country Club existed or did exist as a result of their ownership (via foreclosure) of the 41 Hoylake property. Conversely, if a membership in that club did exist prior to and after foreclosure as a part of the rights of ownership of property located in this housing addition, then that "privilege" of membership was conveyed to you, along with all right, title and interest in that property, as a result of the sale to you of 41 Hoylake. All rights, title, and interest in 41 Hoylake are, of course, subject to our Deed of Trust executed by you to the bank as 1st lienholder of this property.

I hope these clarifications will meet your requirements."

End of quote.

APPENDIX "I"

Quotes from an NCNB document presented to the Fennells in their November, 1988,

banks statements (4):

"Q: Will the terms of my loan change?

A: No. The current terms of your First RepublicBank loan will not change at NCNB Texas. All contracts and other agreements are also still in force."

APPENDIX "J"

Letter from NCNB Texas, signed by Tim Collard (ARO), dated December 27, 1988: Text quoted as follows:

"RE: Clarification of "Baloon" features of Note # 16519 & 16527

The purpose of this letter is to clarify the reasoning for the "balloon" payment feature on the above-referenced notes.

Note #16527 was renewed and increased to $150,800 on 05-18-87, with the renewal note calling for monthly payments of $1,667.00 including interest. This payment was based on an assumed interest rate of 10 1/2%; the note called for an interest rate of InterFirst Bank Abilene, N.A. base rate plus 2 percent, a floating rate of interest. Because interest rates fluctuate, it was felt that the loan should be reviewed annually to adjust the payment on the note to preserve the original (180 month) amortization that was intended between the bank and Mr. Fennell. Thus, with changes in interest rates as the years go by, it would become necessary to adjust the payment on the note to reflect prevailing interest rates so as to preserve the intended repayment period.

Note #16519 began amortization on 10-09-86, with a principal balance of $30,000, with repayment calling for monthly pay-

ments of $660.00 including interest, based on a five year amortization, based on an assumed interest rate of 12.0%, with the actual interest rate charged being InterFirst Bank Abilene N.A. base rate plus 2%, a floating rate of interest. This note was also place on annual "balloon" maturities to allow for adjustments in the payment amount to preserve the original 61 month amortization. As of the present time, interest rates have not increased enough to warrant an adjustment in the payment amount.

Provided that there has been no default in the payment of any of the indebtedness of Mr. Fennell (a default being defined as a payment past due more that 15 days from its due date) and provided that there are not defaults in any of the covenants of the security agreements, needs of trust, or any other collateral security documents, the bank will act in good faith to renew these notes to preserve the original amortizations. The bank is not waiving its right to demand on any or all of the indebtedness of Wendell Fennell (and Celina Fennell) if the Bank in good faith believes that the prospect of payment on any of said indebtedness is impaired.

I hope this clarification meets with your requirements."
End of quote.

APPENDIX "K"

Letter from Wendell Fennell to NCNB (John Combs) dated May 15, 1989, quoted as follows:

"This certified letter establishes my position regarding the financing package agreement between your bank and myself on April 24, 1987.

a. Your bank breached the agreement on Friday, May 12, 1989 by refusing to complete item "3".

b. Your bank breached the agreement by violating the loan disclosure agreement dated 5-18-89 by increasing the rate beyond the limit allowed

The direct damages you have caused me plus punitive for bad faith will be dealt with appropriately, unless you will resolve this problem as follows:

1. Refund the down payment I made for 41 Hoylake and apply that amount to the note on 3117 Buttonwillow Ave.

2. Refund all monies paid for taxes and property insurance on 41 Hoylake.

3. Treat the monthly payments I made on 41 Hoylake as rent."
End of quote

APPENDIX "L"

Letter from Wendell Fennell to NCNB (Darrell Moore, Attorney) dated July 21, 1989, quoted as follows:

"You are advised by this letter, faxed to you on this date, evidence by record of transmission that suit in court(s) of jurisdiction will be filed after time required by law has expired if your client does not settle our claim satisfactory to us.

The causes of action are as follows:

1. Fraud in a Real Estate Transaction in Violation of Tex. Bus. & Com. Code Ann. (27.01

2. Excessive Interest Charged by BANK On The 41 Hoylake Property

3. Breach of Contract

4. Fraud/Negligent Misrepresentation

5. Intentional Infliction of Emotional Distress/Mental Anguish

6. Duress

7. Negligence and Gross Negligence

8. Unconscionable Conduct

9. Deceptive Trade Practices

10. Violation of the Tying Act.

11. Damages and Remedies

Actual: $111,000.00
Consequential: $2,000,000.00
Punitive: $10,000,000.00"

End of quote.